United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 76-4258

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HENRY M. HALD HIGH SCHOOL ASSOCIATION,

Respondent.

B
P/S

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that respondent Henry M. Hald High School Association violated Sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to meet promptly with the Union and by refusing to furnish the Union with names, addresses, and other information concerning the terms of employment of unit teachers.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board for enforcement of its order (A. 97-98)[1/] against the Henry M. Hald High School Association issued September 24, 1974, and reported at 213 NLRB 463. The Court has jurisdiction under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. §151 et seq.), the unfair labor practices having occurred in Brooklyn, New York.

1/ Record references ("A.") are to pages of the abbreviated printed appendix; "Tr." references are to the stenographic transcript of the hearing before the Administrative Law Judge; "GC Ex." and "R Ex." refer to the Board's and Respondent's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Hald Association violated Section 8(a)(5) and (1) of the Act by failing promptly to meet with the Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO (herein "the Union"), upon request for negotiations, and by failing to furnish the Union names, addresses, and other information concerning the terms of employment of the teachers represented by the Union.

A. Background

The Henry M. Hald High School Association ("Association"), operates a system of private nonprofit senior high schools in Brooklyn and Queens, New York (A. 57; Tr. 6). The Association employs approximately 550 lay teachers who are represented by the Union (A. 58). The Association and the Union were parties to a collective agreement covering the '72-'73 and '73-'74 school years (the school year runs from September 1 to August 31). The agreement provided for renegotiation of salaries and wages for the '73-'74 school year upon the Union's timely request (A. 58; Tr. 10, A. 26, 27). The Union properly requested renegotiation of the '73-'74 wages on January 8[2/] (A. 58; Tr. 12, A. 2).

2/ All dates are 1973 unless otherwise noted.

B. Preliminary meetings; the Union's proposal

On January 24, Harry Kranepool, the Union's vice-president, called Brother Medard Shea, the Assocation's assistant superintendent for personnel, and arranged a meeting between the Union and the Association for March 15 (A. 59; Tr. 14, A.3). When Kranepool called March 13 to confirm the arrangements, Brother Medard said he would be unable to attend due to a prior commitment (A. 59; Tr. 15). They then scheduled a preliminary session for March 20 at which they introduced the bargaining teams and set ground rules for the negotiations. They also agreed that the Union would send the Association its initial proposal and that the Association would respond at a meeting on March 29 (A. 59; Tr. 15). On March 25 the Union submitted its proposal which included an across-the-board cost of living increase, an increase in the stipends for department chairmen and assistant chairmen, a change in the qualifications necessary for pay at the "M.A. + 30" level[3/], a change in the dates for presentation of course credit[4/], unemployment and income maintenance insurance, and voluntary payroll deductions for auto and home/apartment insurance (A. 59-60; A. 5).

3/ Under the contract, either a Permanent New York State Teacher's License or a master's degree would qualify a teacher for pay at the "M.A." and "M.A. + 15" levels. Only a master's degree would qualify a teacher for "M.A. + 30." The Union proposed that the Permanent License become the equivalent of the degree in the "M.A. + 30" category as well. (A. 5, 25.)

4/ To qualify for a higher rate based on additional credits, a teacher had to present proof that he or she had earned the credits by September 1 or January 1. The Union proposed to change the qualification duties to October 1 and February 1 (A. 5.)

C. March 29 meeting: The Association fails to respond to the Union's proposal; the Union requests information on the number and pay classifications of the teachers to be employed during the coming year

The Association did not respond to the proposal at the March 29 meeting (A. 60; Tr. 19-20). At the meeting the Union requested a a school by school "grid"[5/] or break down of teachers and their pay classifications for the upcoming '73-'74 school year similar to those they had received during previous negotiations (A. 60, 86, 91; Tr. 20-21, 347-48). Edward J. Burke, counsel and chief negotiator for the Association, said he would "get back" to the Union regarding the information (A. 60; Tr. 22). The meeting closed with a tentative agreement to meet April 10 (A. 61; Tr. 22-23).

On April 3 the Union sent a letter to Brother Medard to confirm the Apirl 10 meeting (A. 61; Tr. 22, A. 6). In a letter dated Monday, April 9, Brother Medard advised the Union that becase he had not been in his office the previous Friday (April 6) he had just read the Union's letter and was unable to assemble Hald's bargaining team for a meeting the following day (April 10). Brother Medard asked the Union to suggest some other dates for the meeting (A. 61; Tr. 24-25, A. 7.)

5/ The columns of the grid (called "lanes") represent the various grades (e.g., "M.A.," "M.A. + 15," "M.A. + 30") and the rows (called "steps") represent the number of years in grade. Each entry indicates the number of teachers employed at the particular lane and step (A. 60 n. 4; Tr. 20-21, A. 12, 19, 29).

Union Vice-President Kranepool objected to the Association's inability to meet at the previously agreed time (A. 61; Tr. 25-26, A. 8). By telegram he informed the Association that the Union "is and has for sometime been ready to negotiate with you at any time and in any place" (A. 61; A. 9, 10). In response the Association noted it had suggested deferring negotiations pending decision in a case then before the United States Supreme Court on the constitutionality of state aid to parochial schools. The Association did, however, schedule a meeting for May 3 (A. 61-62; Tr. 29-30, A. 11).

D. May 3 meeting: The Union again requests employment information; the Association provides information from the previous year and refuses to meet until the Supreme Court decides on state aid to religious schools.

The May 3 meeting was brief. The Union again requested a "grid" for the '73-'74 school year. The Association gave them a grid for '72-'73 (A. 62; Tr. 33-35, A. 12), the Union informed Hald the '72-'73 grid was not what had been requested, and Burke, on Hald's behalf, said he would "get back" to the Union with the information (A. 62; Tr. 35-36). The Union suggested that a meeting be held May 8, 11, or 15. There was no definite response, Burke said the Association would await the decision of the Supreme Court (A. 62; Tr. 37).

In a May 8 letter, the Union requested another meeting, emphasizing it was unwilling to defer negotiations (A. 63; Tr. 39-40, A. 14). On May 10 Mr. Burke replied that because of the impending decision by the Supreme Court and uncertainty concerning enrollment for '73-'74, the Association was defering specific commitment on salary matters "for a month or so when a more definite understanding of the Association's income for '73-'74 will be available"; the Associations was, however, willing to meet if the Union had any additional information or proposals (A. 63-64; A. 38-39).

On May 21 the Union repeated its offer to meet with the Association and asked for some response to its proposal made almost two months before (A. 64; Tr. 41, A. 15). On June 15 the Union again asked to meet with the Association (A. 65; Tr. 41-43, A. 16). On June 25 the Union filed a refusal to bargain charge with the Board (A. 65; Tr. 43), and the Supreme Court rendered its decision, making it clear that the Association's schools would receive no state aid (A. 65; Tr. 43-44).[6/] On June 27 after some consultation, the parties agreed to meet on July 6 (A. 65-66; Tr. 44-45, A. 16, 40).

6/ Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), and Sloan v. Lemon, 413 U.S. 825 (1973), were decided June 25, 1973. The parties stipulated that they knew of these decisions prior to June 27 (A. 65; Tr. 43-44).

E. July: The Union renews its request for employment information and asks for a list of names and addresses of the teachers currently employed and those hired for the '73-'74 school year

At the July 6 meeting the Union renewed its request for the '73-'74 grid and requested, in addition, a current list of the names, addresses, and salaries of the teachers in the bargaining unit (A. 66, 86, 90-91; Tr. 45-46, 172, 355-56). Mr. Burke said that the Association had no legal obligation to provide the names and addresses (A. 75-76; Tr. 152-53) but that he would see what he could do A. 66, 75; Tr. 45-46, 172, 357-58).

On July 11 the Union did receive a grid and some other information. The grid, however, was not broken down school-by-school and the other information provided had not been requested and was was incomplete (A. 67-68; Tr. 54-55, A. 19).

The parties met again on July 13. The Union again requested the '73-'74 grid and the names and address of teachers currently employed by the Association. The Union also asked for the names and addresses of any teachers hired for the '73-'74 year and for the total salary of each teacher, including compensation for directing extra-curricular activities or heading a department (A. 66, 76; Tr. 46-49, 174). Mr. Burke again said that the Union had no right to the names and addresses but that he would get back to the Union in the near future (A. 66; Tr. 175).

F. Despite continual requests the Association fails to provide the names, addresses, and other information regarding employment conditions

Although the Union objected to the delay, the next meeting was scheduled for August 8 to allow members of the Association's bargaining team to go on vacation (A. 67, 68, 69; Tr. 51, 52-53, A. 18, 41-42). At this meeting the Union repeated its request for the teachers' names, addresses, and salaries. The Union specifically requested that the Association indicate wages in addition to salary (stipends for heading a department, conducting extracurricular activities, or coaching). Mr. Burke again promised he would supply the information. (A. 70, 76-77; Tr. 59-61, 179-82.)

When he returned from the annual Union convention on August 22, Union Vice-President Kranepool found he had been sent a list of teachers names and addresses. Again the information was incomplete. The list did not include teachers from either Bishop Kearney or Bishop McDonnell High Schools[7/], there were no teacher salaries or stipends, some of the teachers listed were no longer employed by the Association, and some new hires were not included (A. 70; Tr. 62-65, 182-83, GC Ex. 21). The Union told the Association that the information

7/ Until August 31 the Hald Association included nine schools. As of September 1 Bishop McDonnell High School had been phased out and Bishop Kearney had been transferred to the Sisters of St. Joseph. The Union maintained that it represented the McDonnell teachers with respect to termination benefits and that it continued to represent the Kearney teachers even after transfer (A. 78-79; Tr. 55-58, 221). The latter claim was the subject of a separate unfair labor practice case not before this Court. Henry M. Hald High School Association, 213 NLRB 415 (1974).

was insufficient (A. 72; Tr. 65, 184-85, A. 28a). Mr. Burke again stated that the Union had no right to the information and that he couldn't understand why the Union made so many requests when the Association was doing it a favor by supplying any information at all (A. 76-77; Tr. 187-88). On September 6 the Union stated it wanted a list of the teachers in the unit both at the time of its previous request and as of the present time. Mr. Burke said the Association had "provided some information and that's all he intended to provide" (A. 79; Tr. 189).

On September 10 or 11, the Union received a second incomplete list of teacher's names and addresses. The list did not include new teachers, teachers who had been employed at Kearney or McDonnell, or any salary, fringe benefit, or stipend data; it did include some teachers who were not employed after August 31 (A. 72; Tr. 66-68). At a meeting September 17, the Union informed the Association that this new list was also incomplete. Again Mr. Burke said the Association had no obligation to provide the information, that in doing so it was doing the Union's work. But again Burke said that he would do what he could (A. 72; Tr. 192-94). The Union held a membership meeting that afternoon. The teachers had been working without agreement on wages since September 1 and voted overwhelmingly to strike, which they did the next day (A. 72; Tr. 193-95). A week later the parties held a

meeting to try to settle the strike but were unsuccessful. The Union once more requested the information, Mr. Burke once more denied any obligation to supply it but said he would see what he could do (A. 79; Tr. 195-97). There were similar exchanges at a subsequent Sunday morning meeting and at the strike settlement meeting October 14 (A. 79; Tr. 198-99). The strike ended October 15 (Tr. 199).

During the following week the Union received another list; it too proved incomplete (A. 79). There were no names, addresses, salaries, or other information for teachers who had been employed at either Bishop Kearney or Bishop McDonnell. There were no stipends shown for chairmen, coaches, or moderators of extracurricular activities (A. 72; Tr. 200-01, GC Ex. 24). The Union reiterated its demands during the meetings that took place during the next six weeks and which eventually led to the signing of the new wage agreement. As of the date of the hearing the Union had yet to receive a reasonably satisfactory response to its requests for information (A. 79; Tr. 201-03).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that the Hald Association had violated Sections 8(a)(5) and (1) of the Act by refusing on and after March 29 to confer timely and promptly with the Union and by failing to furnish the Union, upon its request, the names, addresses, and other information concerning the employment terms of the teachers in the bargaining unit. The Board ordered the Association to cease and desist from refusing to bargain with the Union, from refusing to furnish the Union with the names, addresses, salary, and other wages of all teachers in the unit, and from intefering with, restraining, or coercing its employees in any like manner. The Association was directed to bargain with the Union, provide the requested information, and post the usual notices (A. 94-95).

ARGUMENT

THE ASSOCIATION VIOLATED SECTIONS 8(a)(5) AND (1) OF THE ACT BY REFUSING TO MEET PROMPTLY WITH THE UNION AND BY REFUSING TO PROVIDE NAMES, ADDRESSES, AND OTHER INFORMATION CONCERNING THE EMPLOYMENT TERMS OF UNIT TEACHERS

A. General Principles

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees . . . ." Collective bargaining is defined in Section 8(d) of the Act as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employement, or the negotiation of an agreement . . . ." A refusal to bargain in good faith also coerces employees in the exercise of their rights under Section 7 of the Act "to bargain collectively through representatives of their own choosing" and therefore violates Section 8(a)(1) of the Act as well. As part of the duty to bargain in good faith an employer has a positive legal duty to "make expeditious and prompt arrangements to meet and confer." Exchange Parts Co., 139 NLRB 710, 713-14 (1962), enforced, 339 F.2d 829, 832 (C.A. 5, 1965). Accord, N.L.R.B. v. Insulating Fabricators, Inc., 338 F.2d 1002 (C.A. 4, 1964), enforcing per curiam 144 NLRB 1325, 1326-29 (1963); Mid-American Transp. Co. v. N.L.R.B., 325 F. 2d 87, 90-91 (C.A. 7, 1963). An employer must also "provide information that is needed by the bargaining representative for the performance of its duties."

N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967); N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956). In the instant case, the Association violated the Act in both particulars, it unreasonably postponed negotiations and it failed to supply names, addresses, and other information concerning employment terms of unit members.

B. The Association unreasonably postponed meeting with the Union.

The Association had the positive legal duty to exercise "a reasonable degree of diligence" in fulfilling its positive legal duty to "make expeditious and prompt arrangement to meet and confer" with the Union. Exchange Parts Co., supra. Whether a party's conduct conforms to this standard is a decision entrusted in the first instance to the Board. If its findings are supported by substantial evidence, its order is entitled to enforcement. Kayser-Roth Hosiery Co. v. N.L.R.B., 430 F.2d 701, 703 (C.A. 6, 1970); N.L.R.B. v. Fitzgerald Mills Corp., 313 F.2d 260, 264 (C.A. 2), cert. denied, 375 U.S. 834 (1963); N.L.R.B. v. Local 294, Int'l Bhd. of Teamsters, 273 F.2d 696 (C.A. 2, 1960).

In the instant case, the Union properly requested negotiation on the salary provision of the collective bargaining agreement on January 8. The parties met March 20 to establish ground rules and introduce the bargaining teams. The Union made its proposal March 25; the Association was to respond at a meeting on March 29 but failed to do so. Despite constant demands, the Association did not meet with the Union until almost a month later. When the parties eventually did meet on May 3 the Association neither responded to the Union's proposal nor agreed to another meeting. A week later the Association told the Union it would not meet until the United States Supreme Court decided the constitutionality of certain plans for state aid to private schools. The Union was unwilling to wait and demanded meetings as soon as possible. The Association refused and the parties did not meet until July 6, after the Supreme Court had ruled. These undisputed facts (A. 88) show that the Association effectively delayed meaningful negotiations from March 29 to July 6. During this period, the Association did not respond to the Union's proposal and refused to schedule more meetings despite the Union's constant requests.

The Association claimed that deferring negotiations pending a Supreme Court decision that could have resulted in increased income and a change in its bargaining position was not unreasonable. Whether the delay was

unreasonable must be determined upon the facts of each case. The Association's refusal to meet complicated negotiations by delaying them until after the schools had closed for the summer. The end of classes and the departure of administrative staff and teachers made it difficult for the Association to provide essential information concerning salaries and other wages and for the Union to poll its members. The delay also seriously reduced the time available before the current salary provision expired with the beginning of classes and the new school year on September 1 (A. 89). In view of these difficulties the Association could have bargained on the basis of its current financial status[8/] (A. 90).

8/ Because of the Supreme Court's decision, the Association was ultimately required to bargain on the basis of its unsupplemented financial status. Despite its earlier position that unless it recieved aid it could offer no wage increase (Tr. 275, 278, 344), the Association offered an increase in July (Tr. 279), after the Court's decision, and agreed to an increase in settlement of the strike.

In addition to meeting an objective standard of reasonably prompt and frequent negotiations, an employer's postponement and delay must be in good faith. In deciding whether the employer's actions establish a lack of good faith, the Board properly considers the totality of the employer's course of conduct. N.L.R.B. v. F. Bennett Mfg. Co., 291 F.2d 215 (C.A. 2, 1961); Caroline Farms v. N.L.R.B., 401 F.2d 205, 207 (C.A. 4, 1968); N.L.R.B. v. Southern Transport, Inc., 343 F.2d 558, 560 (C.A. 8, 1965). See N.L.R.B. v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (C.A. 1), cert. denied, 346 U.S. 887 (1953). The Association's other conduct includes postponing several scheduled meetings on the flimsiest of excuses[9/] and continual procrastination in providing information to which the Union was entitled.[10/] On this evidence the Board was fully warranted in concluding that the Association unreasonably and in bad faith delayed meeting with the Union.

9/ Brother Medard said he could not come to a March 15 meeting because of a prior commitment, even though the meeting had been arranged two months before (A. 59; Tr. 14-15). An April 10 meeting was rescheduled because Brother Medard could not get the Association's bargaining team together, even though the meeting had been tentatively set two weeks before (A. 61; Tr. 22-23).

10/ The Association's position was always that the Union was not entitled to the information but that it would see what it could do (A. 75, 76-77, 83, 91). An erroneous view of the law, even if held in good faith, is no defense. Old King Cole, Inc. v. N.L.R.B., 260 F.2d 530, 532 (C.A. 6, 1958); Taylor Forge & Pipe Works v. N.L.R.B., 234 F.2d 227, 231 (C.A. 7), cert. denied, 352 U.S. 942 (1956). Time and again again the Association gave the Union insufficient, incomplete, or unrequested information (A. 62, 67-68, 70, 72, 87-88), thus requiring the Union to examine the information, inform the Association of its shortcomings, and make a new request.

C. The Association violated the Act by failing to provide the names, addresses, and other information regarding the employment terms of unit teachers

The statutory bargaining duty also requires that an employer "provide information that is needed by the bargaining representative [of its employees] for the proper performance of its duties." N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967); N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956). The names and addresses of unit members are prerequisites to the union's fulfillment of its duties as bargaining representative, for "[i]t seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf it acts." Prudential Insurance Co. v. N.L.R.B., 412 F.2d 77, 84 (C.A.2, 1969), cert. denied, 396 U.S. 928 (1969). Accord, United Aircraft Corp. v. N.L.R.B., 434 F.2d 1198, 1204-05 (C.A. 2, 1970), cert. denied, 401 U.S. 993 (1971); Standard Oil v. N.L.R.B., 399 F.2d 639, 640 (C.A. 9, 1968). Information on salaries and other wages is likewise presumptively relevant and necessary to a union's negotiation of a contract. Prudential Ins. Co., supra, 412 F.2d at 83-84; N.L.R.B. v. Yawman & Erbe Mfg. Co., 187 F.2d 947, 949 (C.A. 2, 1951).

Again the facts in the instant case are undisputed. The Union first requested the grid of unit teachers for the '73-'74 school year (the year for which salaries were then undur negotiation) on March 29. On July 6 the Union requested the names, addresses, and salaries of all unit teachers. Later in July it asked that the requested information include other wages earned by unit teachers (stipends for coaching, heading a department, or conducting extra-curricular activities). Although the Association did, at various times, supply a '72-'73 grid and incomplete lists of unit teachers, it never did meet the Union's request. Initially the Association said the Union was not legally entitled to the information, later the Association said that computer problems and a lack of staff at its member schools due to summer vacation made it impossible to collect the information requested. As the Board found, neither reason justified the Association's failure to provide the information. And, although the various administration problems made the task more difficult, it is clear that had the Association made an honest, reasonably diligent effort, it could have provided the requested information within a reasonable time. Teacher names, addresses, salaries, and wages, if not readily retrievable from the Association's computer, were available from its member schools (A. 91; Tr. 271-72, 282-86, 288, 293, 347-48). The Association made no effort to collect this information. By delaying negotiations past the end of classes the Association was itself responsible for any difficulties caused by reduced summer staffs. The delay also made it impractical for the Union to contact the teachers other

than by mail (Tr. 176-78). Moreover, the Association's total course of conduct, including the piecemeal fashion in which it furnished what information it did provide, its initial and subsequent delays even while promising to "get back" to the Union, indicates that neither its initial refusals nor its subsequent delays were in good faith (A. 92; see note 10 supra).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter judgment enforcing its order in full.

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